No. 45174-3-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CHRISTOPHER BOYD

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES AND WESTERN STATE HOSPITAL

Appellants.

BRIEF OF RESPONDENT

James W. Beck, WSBA #34208
John C. Guadnola, WSBA #8636
GORDON THOMAS HONEYWELL LLP
1201 Pacific Avenue, Suite 2100
P. O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
Attorneys for Respondent

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I. INTRODUCTION

Respondent, Christopher Boyd, asks this Court to affirm the Judgment entered after a three-week jury trial on Boyd's Washington Law Against Discrimination ("WLAD") retaliation claim against Western State Hospital ("WSH"). The request of WSH for a third trial or dismissal is unfounded.

After Boyd started work at WSH he was subjected to sexual harassment by one of his shift supervisors, Patricia Maddox. In April of 2009, Boyd was direct with Maddox, telling her the sexual harassment had to stop. In response to Boyd's classic protected activity – his insistence that her unlawful conduct cease – Maddox said she would ruin his nursing career. Later, Maddox instigated formal complaints about Boyd intended to trigger a series of adverse employment actions. The charges leveled by Maddox included patient abuse. Maddox also encouraged another supervisor to assert that Boyd was making violent threats in the workplace.

Beyond instigating these charges, Maddox also investigated them, manipulating evidence to ensure WSH would sanction Boyd. Maddox convinced witnesses to change their testimony, omitted a witness's recanting statement, and ignored exculpatory evidence.

Boyd told WSH that Maddox was retaliating against him for his opposition to her sexual harassment. WSH eventually appointed a new investigator, David Rivera, to look into the accusations. However, no complete and thorough neutral investigation ever occurred despite

Boyd's requests. Except for immediately determining the claims about violent threats were unfounded, Rivera relied on the tainted witness interviews conducted by Maddox in reaching his conclusions. In the end, WSH adopted Maddox's conclusions regarding violent threats and adopted findings regarding patient abuse based on Maddox's improper and manipulative witness interviews.

Following his unpaid suspension, Boyd filed suit, and his WLAD retaliation claim proceeded to trial. After an initial mistrial due to Maddox's misconduct, a second trial ended in a verdict for $173,000.

On appeal, WSH argues the trial court erred in denying its CR 50 motion for directed verdict. The issue raised by this argument is whether there was sufficient evidence admitted to support the verdict. Astonishingly, WSH does not challenge the admission of any evidence presented to the jury and does not bother to discuss most of it. Instead, WSH paints a one-sided and inaccurate picture of the evidence presented at trial.

WSH's brief does not even mention anything that happened before December 2009. The evidence admitted at trial established that in April of 2009 Boyd confronted Maddox, telling her to stop the sexual harassment. Report of Proceedings ("RP") 982-83.[1] Ironically, under

[1] The majority of the trial transcript has sequential page numbers. However, for a few dates, the transcripts' pagination begins anew. For those limited days, reference is made to the date and transcript page number. This portion of the Report of Proceedings along with relevant jury instructions and proposed jury instructions are included in the Appendix. *See* Appendix at A1-3.

WSH policy Maddox was designated to receive complaints of sexual harassment. RP 295. Maddox responded immediately with a threat to ruin his career. RP 983. Ultimately, Maddox got her chance to retaliate when a relatively innocuous criticism about Boyd was raised. Because of Maddox's subsequent actions, Boyd was transferred and prohibited from patient contact for two years, RP 625, 1407; suspended for two weeks without pay, Ex. 38; no longer given overtime, RP 1031; and his reputation at the hospital was destroyed through a written reprimand making Boyd out as a violent workplace psychopath. Exs. 119, 154. All of these actions created a hostile environment. The trial court was correct in denying WSH's motion for directed verdict.

The remaining issues raised in WSH's appeal relate to the trial court's decisions on jury instructions. Br. of Appellant at 3-4. First, WSH challenges the trial court's Instruction 9, which defines an adverse employment action. However, WSH's only complaint about the instruction is that it cites the United States Supreme Court's definition of an adverse employment action as expressed in *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). RP 1855. In making this argument, WSH ignores that Washington courts find federal Title VII cases highly persuasive, and that this Court has approved the *Burlington Northern* reasoning: "[w]hether a particular reassignment is materially adverse depends upon the circumstances of the particular case . . . ." *Tyner v. State*, 137 Wn. App. 545, 565, 154 P.3d 920 (2007) (citing *Burlington Northern*).

Second, WSH challenges the trial court's failure to give the jury a 17-question special verdict form. On this issue, WSH waived any request for its original verdict form by agreeing to the modified version drafted by Boyd. RP 1857 ("THE COURT: Ms. Bley, verdict form. Ms. Bley: We'll accept the proposed version contained in Plaintiff's Proposed Second Supplemental Jury Instructions."). Even if this Court were to allow WSH to argue it was error for the trial court to use a verdict form expressly agreed to, the 17-question form was a comment on the evidence, improper argument, cumulative, confusing and materially inconsistent with other unopposed instructions.

Third, and finally, WSH argues the trial court erred in providing Instruction 11, which related to the "cat's paw doctrine" and proximate cause. The trial court instructed the jury based on language proposed by WSH. CP 2063. As for the decision to issue a cat's paw doctrine instruction at all, this was well within the discretion of the court. In *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991), the Court upheld the trial court's denial of a motion to dismiss where one supervisor terminated an employee based on the alleged discriminatory performance reviews given by another supervisor.[2] As federal courts now uniformly apply this doctrine in anti-discrimination cases based on the United States Supreme Court

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[2] While not styled in *Allison* as the "cat's paw doctrine" because the term was just applied in this context the year before by Judge Posner, *Allison* approved the identical concept. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

decision authored by Justice Scalia in *Staub v. Proctor Hosp.*, 562 U.S. __, 131 S.Ct. 1186, 1190 (2011), the trial court correctly determined that Washington Courts will also adopt this theory of liability when given the opportunity. RP 1815.

II. RESTATEMENT OF ASSIGNMENT OF ERROR

1. Was the trial court correct in denying WSH's motion for directed verdict where substantial evidence supported the verdict and none of the trial court's evidentiary decisions are challenged on appeal?

2. Did the trial court act within its discretion by instructing on what constitutes an adverse employment action?

3. Did the trial court act within its discretion by instructing on the "cat's paw doctrine" using language proposed by WSH?

4. Did the trial court act within its discretion in submitting to the jury a special verdict form agreed to by WSH?

III. STATEMENT OF THE CASE

Boyd began working for the State of Washington in June 2004 and working at WSH in 2005. RP 968-69. Boyd was hired at WSH into a Registered Nurse 2 ("RN-2") position, working on Ward C4. RP 970; CP 318. One of Boyd's supervisors was Patricia Maddox. RP 291.

WSH, like most employers, had a written harassment prevention policy. Ex. 13. As a supervisor, Maddox had specific responsibilities under the policy, and as she acknowledged, was "one of the individuals that would receive reports of alleged discrimination or

harassment." RP 295.[3]

While Maddox's initial interactions with Boyd were unremarkable, by 2006, this began to change. RP 971. Maddox started to single out Boyd for special treatment not provided to any other co-workers, such as purchasing gifts like shirts and food for Boyd. RP 971-72; Exs. 14-15. Maddox also started to discuss intimate personal issues with Boyd, telling him, for example, that she was lonely and he was "cute." RP 973. Maddox would invade Boyd's personal space by moving her chair in a back office right up next to his and sitting in a sexually provocative manner. RP 552, 974. Several co-workers observed this inappropriate conduct. RP 260, 551-52.[4] Maddox also went around WSH referring to Boyd as "her penis." RP 975, 1735;[5] CP 319. In Spring 2007, Maddox asked Boyd to come to her house to assist in installing some new heaters. RP 303, 975. While Boyd was

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[3] WSH's harassment policy outlines the different forms sexual harassment can take, including verbal harassment, sexual propositions, and non-verbal inappropriate behavior, all of which Maddox was trained to recognize and prevent. RP 296-297; Ex. 13. Maddox was also required to model behavior for subordinate employees. *Id.*

[4] WSH employee James McNeil observed an encounter, which he described as: " . . . she was so close to him she had her legs under his and it was about - between the two chairs where the arms of the chair fit, it was about an inch distance between. She was sitting just that close toward him. And it was - and in anybody's logical thinking between normal human beings would think that this was extremely close proximity, especially between someone who is an RN-3 and an RN-2. Q. What you observed, do you consider it to be sexually inappropriate? A. Yes, I did." RP 551-52. WSH employee Barbara Robins concurred: "Chris was pinned against - Tricia [Maddox] had Chris pinned against the wall and he was between the end of the desk and the wall and she was sitting in front of him, slouched down in her chair with her legs underneath the chair in a real provocative situation . . . ." RP 260.

[5] Peggy Nelson, HR employee, testified Maddox "referred to male employees as her penis[.]" RP 1735. WSH employee Robins testifying to the same RP 257 ("Q. What was it that you heard Patricia Maddox refer to Chris Boyd as other than his name? A. Her penis."). WSH eventually reprimanded Maddox for her conduct. RP 1734-35.

reluctant to go to her house, he felt pressured because she was his supervisor and an assertive person. RP 975. When Boyd arrived at her home, Maddox was dressed in a "see-through" négligée and eventually propositioned Boyd while he was installing a heater in her bedroom. RP 977-80. While lying on her bed, Maddox told Boyd, "you don't have to be afraid to touch me." RP 980; CP 320.[6]

By April 2009, Boyd finally worked up the courage to confront Maddox directly and oppose her sexually inappropriate conduct. Maddox had asked him whether he was going to come to her home again. RP 982. Boyd responded, telling her to "leave me alone" and that "this is not going to happen." *Id.*, CP 322. Maddox responded with overt hostility, expressly threatening Boyd that if he were to "tell anyone about us, I will make sure that you cannot work in any of the 50 states." RP 983 (Appendix A1-4); CP 322. From that point on, Maddox changed her demeanor towards Boyd, acting in a critical way towards his work. RP 261 ("all of a sudden she just got really hostile").

On January 7, 2010, Maddox finally had her first opportunity to do substantial harm to Boyd in retaliation for having opposed her sexual conduct. At 3:07 a.m. on January 7, 2010, Maddox and another

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[6] Aside from Maddox's outrageous conduct, other problems with sexual harassment were prevalent at WSH. CP. 321; Ex. 35. This included pornographic movies at work, the use of sex toys, and racial comments about an African American called "Bush Man" at work. Ex.35; CP 321. Boyd also complained about these acts. Ex. 35 ("Chris Boyd has complained that movies with sexual content, and particularly movies with sexually violent content were inappropriately being shown to the patients.")

supervisor, Paula Cook-Gomez,[7] exchanged email communications where they stated that because of "his lies and manipulations" "the issues with Chris should be brought to light once and for all." RP 309. Within 24 hours of this email, Maddox and Cook-Gomez lodged two separate complaints about Boyd. One charged Boyd with patient abuse, which allegedly occurred two weeks before but was not reported earlier because it was an unremarkable event. RP 531. The second related to an alleged violent threat in the workplace. The decision by the two women to initiate the complaints was completely unrelated to the December incident. RP 310

Maddox instigated the investigation into Boyd regarding allegations of patient abuse the same day as the email exchange with Cook-Gomez, RP 1119, even though no Security Incident Report [8] was filed. RP 1498, 1748. Maddox went to Boyd's co-workers collecting statements. *Id.* The patient abuse allegation was that two weeks earlier, Boyd delayed responding to a call from a subordinate Licensed Practical Nurse (LPN) for sleeping medication, RP 1507, and that he responded to the LPN's call by pretending to be one of his colleagues.[9]

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[7] Maddox described her relationship with Cook-Gomez as "partners." RP 371. They were also friends with each other on Facebook. RP 372.

[8] Any allegation of actual patient abuse required the prompt filing of a Security Incident Report. HR employee Nelson testified: "Q. Okay. Now this December 26th incident, there was no security incident report filled out for that circumstance, was there? A. Not to my knowledge." RP 1748. Nelson testified this and a similar "AIR" report were required but neither was done. *Id.* ("They're required for patient incidents, yes.")

[9] WSH's second investigation did not sustain the claim: "[i]t could not be determined if Mr. Boyd had identified himself as Mr. Guingab when he answered the phone the second time Mr. Bagsic had called him." EX. 144.

RP 1504. Out of these issues, "the most important" question was "whether or not Christopher Boyd assessed the patient[.]" RP (6/19/13) 112. The reason Boyd did not instantly provide a second dose of a hypnotic sleeping medication, Restoril, was that Boyd learned the LPN, had approximately two hours earlier at 11:19 p.m., given the patient a cocktail of three drugs: (1) Benadryl (25 milligrams); (2) Ativan (2 milligrams), and (3) Restoril (15 milligrams). RP 791, 991.[10] The WSH Psychiatric Nurse Executive, Julia Cook, agreed it would not be appropriate to repeat a second Restoril dose in this timeframe:

> Q. You wouldn't want a patient who received Restoril at 11:19 to get a second dose of Restoril at 1:30 because it takes time for the drug to affect the person who had received it, correct?
>
> A. Yes.

RP 791. In fact, 20 to 30 minutes after receiving the first call, Boyd physically assessed the patient. Ex. 85, RP 996-97. After receiving clearance from a physician, RP 1001, Boyd authorized a second dose of Restoril at approximately 2:20 a.m. Exs. 188, 28.

This "incident" was known to Maddox the day it occurred.

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[10] At trial, Bagsic was shown to be a non-credible witness regarding the events as he denied having given the patient these drugs. RP 1129. However, the medical "Pyxsis report" showed that in fact Bagsic did give the patent this cocktail of medications. RP (6/19/13) 86-87 ("Q. Let's put it this way: The patient that was the subject of requesting a Restoril is the patient that got all of those three drugs? A. Okay. Yes. Q. That was Rod Bagsic that did all of that, correct? A. Correct."). Bagsic also manipulated the patient's medical chart to eliminate any charting for the drugs besides Restoril. RP (6/19/13) 88-89. For this serious misconduct on December 26, 2009, Bagsic was neither investigated nor given any discipline. RP (6/19/13) 90 ("Q. Did he get in any type of trouble for not charting those drugs? A. No.").

RP 432-33. Under WSH policy a Security Incident Report should have been filed if Maddox believed the alleged conduct was significant. RP 1748, 1498.[11] No such report was ever filed. RP 1748. Instead Maddox did nothing for two weeks, until she and Cook-Gomez hatched their scheme, and Maddox lodged a complaint, triggering an investigation. She then hijacked the investigative process, manipulated all the rules and violated all of WSH's protocols for neutral and unbiased investigations, to punish Boyd. HR Director Lori Manning testified that Maddox should not have collected statements because she was not assigned to investigate. RP 581-82.[12]

Maddox drafted a statement for one witness where she asked leading questions to change the witness's recollection of timing from approximations, RP 1119, to exact times to extend the supposed delay in Boyd's response time. RP 1123, Exs. 75, 87. This was typical of her manipulation of her manipulation of witness interviews. Exs. 87-90. Maddox deliberately chose not to ask about prior medications because the answers would explain why Boyd need not assess the patient

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[11] WSH investigator Rivera also testified: "[i]f there was a patient abuse allegation, they're required to fill out a security incident report . . . ." RP 1422. In fact, Rivera's office was charged with investigating the failure to file an SIR report. RP 1524 ("Q. Now you mentioned that if there were no SIR there, that leads to an inquiry by your office; is that correct? A. Yes."). However, there was no inquiry by his office when Maddox failed to submit an SIR. *Id.*

[12] Manning testified: "Q. Let me be clear about this so there's not any confusion. What you just told us is it would be wrong under policy to have Patricia Maddox collecting witness statements about December 26, 2009, when she wasn't actually the person assigned to do the investigation, right? A. She should have not." RP 581-82 (emphasis added). Despite never being assigned as formal investigator, WSH employees believed Maddox was the investigator for the December 26, 2009 charge. RP 1120 (Bagsic testified: "Q. It was your understanding that Patricia Maddox was investigating the incident; is that correct? A. Yes, being supervisor.").

immediately. *Id.* Maddox even asked to personally interview Boyd regarding the December 26, 2009 situation, which was allowed over Boyd's objection. RP 1020-21, RP (6/19/13) 116, Ex. 189.

The allegations of violent threats also surfaced for the first time on January 7, 2010, when Cook-Gomez reported Boyd allegedly threatened employee Irma Ward by saying, "they might fire me, but they sure will remember me." Ex. 24.[13] With Maddox in charge of the investigation, the allegations quickly expanded; the enhanced version made Boyd out to be a lunatic, threatening to use weapons with silencers, to burn women's bodies in the trunks of cars, and to shoot things with an AK-47. Ex. 83; CP 107. These allegations about Boyd were false.[14]

The statements Maddox twisted into threats of violence originated from a group conversation initiated by a different employee, Kenny Ray, about a television program. RP 536, 1009 ("Kenny had mentioned something about what he saw on Spike TV . . . ."). Manuel Guingab was the one talking about an AK-47 as he owned a gun that "looked like an AK-47." RP 1013, 537-38. Boyd did not make the

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[13] HR Director Manning testified Ward was the genesis of the violent threat allegations: "Q. And by the way, Irma Ward's alleged complaint was the first that got things rolling on these threatening statements, right? A. Correct." RP 592.

[14] WSH's brief inaccurately states that "[e]ven Boyd agrees that the facts set forth in Notice of Intent warranted discipline action, up to and including dismissal." Br. Appellant at 30. While this uncited claim is incorrect, it is also not relevant on appeal as explained in unopposed Instruction 7: "Mr. Boyd does not have to prove that his opposition was the only factor or the main factor in Western State Hospital's decision to take an adverse employment action, nor does Mr. Boyd have to prove that he would not have been subjected to such an adverse employment action but for his opposition." CP 2158 (Appendix A3-1) (emphasis added).

comments Maddox attributed to him. Ex. 102, RP 1082-83.[15]

Irma Ward quickly recanted having ever told Cook-Gomez that Boyd made a threatening comment. Ex. 23. Instead of acknowledging that the allegation was meritless, Maddox eliminated all reference to Ward recanting from her report but left in the charge that Boyd had made the threat. Ex. 21. Maddox wrote: "I dropped the interview of Irma Ward that did not add to the tale." Ex. 21 (emphasis added). As HR Director Manning testified, RP 595-96, Maddox's conduct was inexcusable:

> Q. And is it true that there would be no legitimate reason to remove a document that was provided during an investigation? Do you agree with that?
>
> A. I agree with that.
>
> . . . .
>
> Q. You told Patricia Maddox that her final report should include reference to Irma Ward recanting, right?
>
> A. Correct.
>
> Q. But that didn't happen, did it?
>
> A. I believe that that got left out of the investigation.

Rather than including the explanation, Maddox's final report starts with the Ward allegation: ". . . Paula Cook-Gomez RN3 was told by Irma Ward LPN4 that Christopher Boyd RN2 had made a statement of a threating nature against Western State Hospital (staff)." Ex. 119. The allegation is included in the reprimand: "you made a threat 'They might fire me, but they will sure remember me.'" Ex. 154. Referencing

[15] The claim Boyd was threating co-workers with a knife was also not true. RP 1015.

Maddox's report, the reprimand explains "[t]he above mentioned incidents were investigated internally . . . . The investigative report is attached and incorporated by reference." *Id.* (emphasis added). The reprimand also states "your inappropriate and threatening comments made in front of your co-workers created an environment where there was intimidation . . . that was investigated and where findings were substantiated against you." *Id.* (emphasis added).[16]

The false claim attributed to Ward was not the only clear fabrication in Maddox's report.[17] The report also ends with her factual findings regarding an alleged "statement of retaliation" that Boyd made to another employee, Andy McCants. Ex. 119. Maddox's report leaves the impression that Boyd was threatening his co-worker: "Christopher Boyd RN2 stated to Andy McCants IC3 telling how he would get people in trouble by reporting that they were sleeping and playing with their phones on the unit on nightshift." *Id.* In reality, Boyd was one of McCants' supervisors, McCants was sleeping on the clock, and Boyd told McCants that it was not appropriate and he would report him if it continued. Under questioning at trial, Maddox conceded Boyd's actions

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[16] While WSH's brief makes the inaccurate statement that "there is no evidence that Maddox had any impact whatsoever on the decision to reprimand Boyd[,]" Br. of Appellant at 34, Maddox's investigation was the only reason for his written reprimand and was actually incorporated into the written reprimand. Ex. 154. HR employee Nelson testified: "Q. And so Patricia Maddox's report was part of the written reprimand; was it not? A. It was utilized to write the written reprimand, yes. Q. When you say incorporated by this reference, what that means is that you're making it a part of it, correct? A. Yes, it's attached to the letter." RP 1754.

[17] During Maddox's "investigation" an example of her inappropriately suggestive questions to witnesses was: "I understand that Chris Boyd has made statements of retaliation towards his co-workers. What can you tell me about this?" Ex. 29.

regarding McCants were appropriate:

> Q. Is there anything wrong with Chris Boyd telling Andy McCants that he's going to report people for sleeping and playing on the phone?
>
> A. No, there's nothing wrong with that.

RP 369. Nonetheless, Maddox ends her report describing Boyd's conduct with McCants as a "confirmed" "statement of retaliation." Ex. 119.

Indeed, Cook-Gomez was the only person who ever claimed to be intimidated by Boyd,[18] and even her first report explained that Boyd's "statements were to another staff and not directed at me." Ex. 25. Yet, Maddox pressed Cook-Gomez to modify her statement and speculate that Boyd was directing his statements at Cook-Gomez: "I would have said in the ? re his statements of violence that where as they were not said to you that you were obviously present and felt that you were meant to hear them." Ex. 25.

Instead of approaching the task of investigator as a neutral, unbiased and objective individual, Maddox began her investigation by writing, "I don't trust Chris about anything as he is known to lie." Ex. 25. Maddox admitted she should only conduct investigations after being assigned to do so. RP 336. She agreed an investigator must be

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[18] Manning was impeached with testimony she provided as the hospital's CR 30(b)(6) representative: "Q. Okay. So you were asked the question; 'QUESTION: Okay. So the only witness who thinks the comments were meant to be intimidating was Paula Cook; is that correct?' And then how did you answer that? A. Correct." RP 590.

neutral. RP 337. She agreed an investigator must keep an open mind. *Id.* She agreed an investigator should not put words in the mouth of a witness. *Id.* She agreed an investigator should not be a witness in her own investigation. RP 338. She agreed that if she could not comply with these rules she should remove herself from the investigator role. *Id.* And, she agreed that an investigator should include all pertinent information, good and bad, in the report. *Id.* Maddox violated each one of these rules in her "investigation" of Boyd. RP 343-63.

Boyd alerted WSH to Maddox's retaliation, but WSH allowed Maddox to participate in interviewing Boyd. RP 1020. Before his interview, Boyd went to Maddox's supervisor, Annette Southwick, and told her he did not want Maddox participating in the interview because of an "issue between me and Trish" of "an intimate sexual type nature." RP 1020-21. Southwick responded by cutting off Boyd from talking further. RP 1021. Instead of allowing Boyd to explain further details, Southwick sent an email to Human Resource employee Peggy Nelson on January 26, 2010 where she wrote: "Chris is uncomfortable having Trisha Maddox at the meeting." Ex. 189. Nelson responded by asserting they could call Maddox's presence "training" and that would create a basis for having Maddox in the interview. *Id.*; RP 1747.[19]

By July 2010, it became clear to Boyd that WSH was going to allow

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[19] Nelson's failure to act on this information was in violation of WSH policies. HR Director Manning testified "[i]f Peggy Nelson had become aware of that information, she would have come to me;" yet, there was no report to Manning. RP 693.

Maddox to carry out her vendetta against him, and he hired an attorney. RP 1022-1023. In August 2010, Boyd's attorney issued a Public Records Act request investigating the matter. RP 1023. On December 1, 2010, Boyd met with the WSH CEO and outlined Maddox's sexual and retaliatory conduct. Ex. 26. On December 3, 2010, Boyd filed a charge of discrimination with the federal Equal Employment Opportunity Commission ("EEOC"), wherein he cited ongoing retaliation for refusing to engage in a sexual relationship. Ex. 34. On December 9, 2010, Boyd's lawyer wrote WSH detailing the harassment. Ex. 35.

WSH responded by asking David Rivera to review the prior Boyd investigations. RP 592. Rivera was charged with reevaluating both the investigation into alleged patient abuse and the investigation into alleged violent threats. RP 592.[20] Rivera quickly learned there was no merit to the violent threats allegations. RP 592-93. Yet, by this point Maddox had succeeded in harming Boyd's reputation to such an extent that WSH reprimanded Boyd based exclusively on Maddox's biased and inaccurate report. RP 592-593. Manning testified:

> Q. Now when David Rivera looked into this, he found out that Irma Ward had put some context to this allegation, right?
>
> A. I believe that's correct.

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[20] HR Director Manning testified: "Q. Now David Rivera was asked to look into both – to kind of review the investigation done by Patricia Maddox, and the investigation done by Paula Cook-Gomez, right? A. Correct." RP 592.

Q. That it wasn't a threatening comment, it was a comment about being a little bit quirky like in apple cider vinegar, something to that effect?

A. That sounds about right.

Q. Okay. And at that point in time, David Rivera quit the investigation with respect to these threatened statements, true? Didn't take further action?

A. Correct.

Q. It was a dead deal, right?

A. Correct.

Q. Yet Chris Boyd was still reprimanded in writing for every one of those threatening comments, right?

A. Correct.

RP 592:16-593:10. When pressed to explain how WSH's actions were justifiable, Manning testified it was not her decision:

Q. So I'm trying to understand if you think that you did make sure it was complete and thorough, yet something that we've agreed upon wasn't a threat he was sanctioned for, can you explain how that happened?

A. Well, ultimately, I believe it was nurse executive who made the decision to issue the discipline.

RP 594. However, the nurse executive testified she was not involved:

Q. You weren't involved in deciding the discipline of him, correct?

A. No.

Q. So if Lori Manning were to have testified to the jury that it was your decision to reprimand him, that would be incorrect with your understanding, right?

A. Well, yes.

RP 732:8-14.[21]

Rivera's investigation into the allegation of patient abuse relied upon Maddox's prior witness interviews and was both factually inaccurate and incomplete. Rivera simply used the biased statements prepared by Maddox and asked witnesses to confirm what Maddox recorded. RP 1517. Rivera declined to interview Boyd. RP 626. Instead, he relied on the interview of Boyd conducted by Maddox. RP 1516. Rivera did not separate Maddox's animus from the process.

Rivera's investigation was also incomplete. There were two complaints from December 26, 2009 regarding Boyd: (1) whether Boyd failed to respond promptly to assess a patient, and (2) whether Boyd impersonated a co-worker. RP 1503-04.[22] The primary question was whether Boyd assessed the patient. RP (6/19/13) 112. However,

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[21] Psychiatric Nurse Executive Cook testified: "Q. You testified I believe on Thursday that it was not your decision to have Christopher Boyd suspended [over] the circumstance, correct? A. I did not have any input into discipline." RP 795-96 (emphasis added). Remarkably, WSH wrongly asserts the decision was made by both Manning and Cook. Br. of Appellant at 46 (writing without citation "[i]t is undisputed that the decision to provide Boyd with a Letter of Reprimand for those statements was made by Human Resources along with the Psychiatric Nurse Executive.")

[22] Rivera testified: "Q. Okay. And in interviewing other witnesses, you relied on - or you allowed those witnesses to use their interviews or the statements they prepared for Patricia Maddox; is that correct? A. I used them and confirmed it with the employees. Q. Okay. Those were the statements that they had provided to Patricia Maddox though? A. Yes." RP 1516-17. He also testified: "Q. So you - when you met with witnesses, they at times mentioned that they had a hard time remembering what happened on December 26th, 2009? . . . THE WITNESS: Some staff. BY MR. PENALVER: Q. And when that happened, they would rely on their statements to Patricia Maddox; is that correct? A. Yes." RP 1521.

Rivera conceded he did not even ask the witnesses whether they saw Boyd assess the patient. RP 1504-05.[23] In fact, an eye-witness saw Boyd assess the patient, Ex. 85, but Rivera never considered the witness's statement, nor did he ask the witness whether she saw Boyd assess the patient. RP 1506; Ex. 85.

Also, for reasons never explained, the phone records of calls during this limited window showing the exact timing of the events of December 26, 2009 were deleted. RP 1509-10, Ex. 184. Despite the unusual nature of this deletion, Rivera never made any effort to determine why the calls were deleted. RP 1510. Lastly, Rivera's report also made a critical math mistake; he said Boyd could have given a second Restoril dose when it was initially requested because three hours had passed, but in actuality it was only two hours. RP 791, 794, 1516.[24] Rivera's report does not even make mention of the prior doses of Benadryl and Ativan that the patient received. RP 792.

In the end, as a result of Maddox's actions: WSH removed Boyd from having patient interactions, RP 625, 1407;[25] referred the violent

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[23] Rivera testified: "Q. Okay. Did you ask any of the witnesses whether he assessed the patient? A. No, I don't recall asking. Q. Do you think it would have been helpful to ask the witnesses that question? A. Probably would have been a good question." RP. 1504-05.

[24] Rivera testified: "Q. So, that would have been about two hours; isn't that correct? A. Yes. Q. Not three hours? A. Yes. Q. So three hours is incorrect? A. That's true." RP 1516.

[25] HR Director Manning testified: "Q. There is a section on the bottom that says, Boyd reassigned under investigation and it goes for a period of approximately two years; that's correct? A. That would be correct. Q. And during that time period, Christopher Boyd was not allowed to have patient interaction, correct? A. That is correct." RP 625. During the course of WSH's two year investigation, Boyd sustained a work related injury and was absent for a period of this time. However, the reason for preventing Boyd from having patient interactions was due to the nature of the allegations against him, not his absence due to a work place injury. RP 689-90.

threats to the Lakewood Police Department and Washington State Patrol for criminal action, RP 584; issued a charge on Christopher Boyd's nursing license to the Department of Health, RP 737;[26] deprived Boyd of any overtime, RP 1031; and reassigned Boyd away from his job on the ward for two years. RP 625. Julia Cook, Lori Manning, and Boyd's new supervisor, Jack Dotson, were all copied on his reprimand, to which Maddox's investigative report was "attached and incorporated by this reference." Ex. 154. Boyd was also suspended for two weeks without pay. Ex. 38.[27]

After his suspension, Boyd filed suit. CP 1. On January 18, 2013, WSH moved for summary judgment. The trial court granted WSH's motion with respect to sexual harassment but denied WSH's motion with respect to retaliation. CP 530-32.

The first trial of this matter started on June 3, 2013. CP 2293. After Plaintiff's first witness, Maddox was called as a hostile witness.

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[26] As WSH Psychiatric Nurse Executive Cook confirmed, filing the charge with the Department of Health on Boyd's license was "not a trivial matter." RP 737.

[27] Shortly after his return from suspension, Boyd filed suit in Pierce County Superior Court, which was also protected activity. RP 560-562, CP 1. Boyd then found himself being left alone on the ward. This was completely inappropriate and unprecedented. RP 762. Boyd raised this lack of staffing with his new supervisor, Dotson, but no action was taken. RP 763, 1710-13. WSH had a policy and requirement that at least six personnel be present on the ward at all times to adequately supervise. RP 758. No other employees, other than Boyd, were experiencing the situation where they were being left alone on the ward. RP 762, 848. At trial, Boyd presented evidence that the hospital's refusal to respond to his lack of adequate staffing was retaliatory as Dotson knew Boyd was suing the hospital and was given a copy of Boyd's written reprimand. RP 623; Ex.154. The lack of staffing culminated in a patient death. RP 805-07. At WSH's request, the jury was asked to state what damages, if any, were attributable to the death. CP 1985. The jury answered this special interrogatory stating that no damages were awarded on this basis. CP 2170. With the jury's answer to the special interrogatory in mind, WSH's brief does not discuss the death, and therefore, neither does Boyd's Response Brief.

CP 2296. However, during a break in her testimony, Maddox went into "the jury room." CP 2291, 2295. One of the jurors brought this to the court's attention. *Id.* As a result of Maddox's actions, WSH requested a mistrial, which, over Boyd's objection, was granted. CP 2296.

The second trial began on June 10, 2013. After the close of Boyd's case, WSH brought a motion for directed verdict. CP 1787. WSH did not challenge the fact that Boyd engaged in statutorily protected activity. CP 1793. Instead, WSH argued there was no evidence of adverse employment actions caused by retaliation. CP 1794-1800. The trial court denied WSH's CR 50 motion. RP (6/19/13) 16.

Relevant to the issues on appeal, the trial court instructed the jury on the definition of an adverse employment action as described by the United States Supreme Court in *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). CP 2160 (Instruction 9). WSH objected to this instruction on the narrow basis that the instruction relies on federal law. RP 1855 ("we'll take exception to the fact that that language is given as we believe that's federal law"). The trial court also decided to give a special verdict form upon which both parties agreed. RP 1857 ("THE COURT: Ms. Bley, verdict form. Ms. Bley: We'll accept the proposed version contained in Plaintiff's Proposed Second Supplemental Jury Instructions."). Lastly, the trial court provided an instruction based on the "cat's paw doctrine" – using language drafted by WSH. CP 2063. The trial court gave this instruction because Boyd's theory was that Maddox acted out of retaliatory animus, taking a series

of actions against Boyd for the purpose of triggering adverse employment actions carried out ultimately by WSH administration. On June 29, 2013, the jury determined WSH retaliated and awarded Boyd $173,000 in damages. CP 2169-70.

IV. ARGUMENT

A. Standard Of Review For Trial Court Decisions

WSH fails to adequately discuss the standard of review for this Court's consideration of motions to dismiss under CR 50 and jury instructions, the two issues upon which WSH bases its appeal.

Under CR 50, "judgment as a matter of law is only appropriate when no substantial evidence or reasonable inference would sustain a verdict for the nonmoving party." *Corey v. Pierce County*, 154 Wn. App. 752, 760, 225 P.3d 367 (2010).

> In ruling upon a challenge to the sufficiency of the evidence, a motion for a directed verdict, or a motion for judgment notwithstanding the verdict, no element of discretion is involved, and such motions can be granted only when it can be held as a matter of law that there is no evidence or reasonable inference therefrom to sustain a verdict for the opposing party. . . . A motion for nonsuit admits the truth of the evidence, and all inferences arising therefrom, of the party against whom the motion is made. It requires that the evidence be interpreted most strongly against the moving party and most favorably to the opposing party. It is only when the court can say that there is no evidence at all to support the plaintiff's claim that the motion can be granted.

Miller v. Payless Drug Stores of Wash., Inc., 61 Wn.2d 651, 653, 379 P.2d 932 (1963). "A jury is free to believe or disbelieve a witness,

since credibility determinations are solely for the trier of fact. Credibility determinations cannot be reviewed on appeal." *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). "Juries decide credibility, not appellate courts." *Id.* at 575.

These principles are even more pronounced in the context of employment discrimination cases where claims are often supported solely by circumstantial evidence. *Johnson v. DSHS*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996) (noting that "summary judgment should rarely be granted in employment discrimination cases."). "Because judgment as a matter of law intrudes upon the rightful province of the jury, it is highly disfavored and judgment may be entered only when no jury could decide in that party's favor." *David E. Breskin*, 10 *Washington Practice* § 50.1 (2013).

With respect to jury instructions, this Court considers the instructions as a whole. *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 533, 730 P.2d 1299 (1987). Jury instructions are generally proper if they are supported by substantial evidence, allow a party to argue its theory of the case, and are not misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). While this Court must review errors of law in a jury instruction *de novo*, *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995), the Court must also review the decision to give or refuse to give a particular instruction under an abuse of discretion standard. *Young v. Key Pharms., Inc.*, 130 Wn.2d 160, 176-77, 922 P.2d 59 (1996) (number

and language of instructions left to trial court discretion). An error on jury instructions is not grounds for reversal unless it is prejudicial, that is, unless it affects the outcome of the trial. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996).

B. WSH Did Not Assign Error To The Admission Of Evidence

In its assignments of error, WSH does not challenge the admissibility of a single piece of evidence admitted at trial. Br. of Appellant at 3-4. Presumably, WSH understood the vast amount of evidence of opposition activity, adverse employment actions, and causation was admitted either without objection, at the request of WSH, or at the joint request of both parties. CP 555-67. The failure of WSH to contest the admissibility of evidence is particularly significant because the hospital's brief largely ignores the evidence supporting Boyd's claim.[28]

C. Evidence of A WLAD Violation May Be Direct Or Circumstantial

The purpose of WLAD "is to deter and to eradicate discrimination in Washington." *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). The WLAD "embodies a public policy of the highest priority." *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999) (quotations omitted). The statute mandates a liberal construction to accomplish its purposes. RCW 49.60.020.

The Legislature expressly found and declared that discrimination

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[28] For instance, WSH begins its recitation of facts on December 26, 2009, several months after Boyd's initial opposition activity in April 2009. Br. of Appellant at 5.

"threatens not only the rights and proper privileges of [Washington's] inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. Thus, "[i]t is an unfair practice for any employer . . . to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter." RCW 49.60.210.

Whether retaliation was a substantial factor in an adverse action, "generally presents a question of fact." *White v. State*, 131 Wn.2d 1, 16, 929 P.2d 396 (1997); *see also Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003) ("Whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the timing and the surrounding circumstances.").

A plaintiff may establish a WLAD violation through either direct or circumstantial evidence. *Alonso v. Qwest Communications Co.*, __ Wn. App. __, 315 P.3d 610, 616 (2013); *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003). Here, Boyd presented both direct and circumstantial evidence sufficient to support the verdict.

D. Direct Evidence Sufficiently Supports The Jury's Verdict

When an employee presents direct evidence of retaliatory animus, a trial is required for the fact finder to determine the credibility of the evidence. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 359, 172 P.3d 688 (2007) (holding employee's WLAD claim "is supported

by direct, as opposed to circumstantial, evidence. Hence, her second claim is not to be analyzed under the three-step protocol from *McDonnell Douglas*, 411 U.S. 792, 93 S.Ct. 1817."). "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." *Stegall*, 350 F.3d at 1066 (citations omitted). Direct evidence includes statements by a decision maker and other "smoking gun" motive evidence. *Fulton v. State*, 169 Wn. App. 137, 148 n.17, 279 P.3d 500 (2012). "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Stegall*, 350 F.3d at 1066 (citations omitted).

Here, Boyd presented direct evidence of retaliation. In April 2009, Boyd told Maddox to stop her sexual advances. RP 982. In return, Maddox said she would ruin his career. RP 983 ("I will make sure that you cannot work in any of the 50 states.") This evidence was also presented in trial exhibit 35: "she told him that if he ever told anyone about their 'private conversations,' she would ruin his career." Ex. 35.[29] Maddox's statements are direct evidence of retaliatory

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[29] In her capacity as a supervisor, Maddox's statements were determined by the Court to constitute party-opponent admissions as she was a speaking agent for WSH. RP (6/5/13) 13-19, 21-22. During the first trial, the Court explained: "I still believe that the party opponent exception may apply in this case, given her level of supervisory role, especially if she's left in charge of a unit, in this case C-4?" RP (6/5/13) 19. The required foundation was established shortly thereafter. *Id.* at 21-22. The same foundation was again provided in the second trial. RP 252, 256-57. While WSH again objected based on hearsay, the trial court overruled the objection without requiring the parties to re-argue the same issue previously placed on the record. RP 257. These evidentiary rulings are not challenged in this appeal. Boyd has filed a motion pursuant to RAP 9.10 regarding this portion of the transcript.

motive, which supports the verdict without the need for any inferences.

E. Circumstantial Evidence Sufficiently Supports The Jury's Verdict

An employee demonstrates a prima facie retaliation case through circumstantial evidence by showing "that (1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee's activity and the employer's adverse action." *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005). If the employer articulates a legitimate non-retaliatory reason, then the employee can create a question of fact as to whether the claimed reason is unbelievable or pretext. *Id.* Each element is discussed in turn.

1. Boyd Engaged In Statutorily Protected Activity

A plaintiff engages in a statutorily protected activity by opposing conduct he reasonably believes to be in violation of the WLAD. *Estevez*, 129 Wn. App. at 798. Like other WLAD provisions, opposition activity is interpreted broadly. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 848, 292 P.3d 779 (2013). "The term 'oppose,' undefined in the statute, carries its ordinary meaning: 'to confront with hard or searching questions or objections' and 'to offer resistance to, contend against, or forcefully withstand.'" *Id.* (quoting Webster's Third New International Dictionary 1583 (2002)). In *Lodis*, the Court held when a human resource director, Lodis, "spoke with" one of the company's business executives, Shenk, about his "age related comments" this

was sufficient for opposition activity. *Id.* at 843, 852 ("there are genuine issues of material fact whether Lodis engaged in statutorily protected opposition activity under RCW 49.60.210(1)").

At the trial court level, WSH did not contest this element. CP 1793, RP (6/19/13) 4 (WSH arguing "plaintiff can't prove the second and third elements of retaliation . . . ."). Curiously, WSH does not even reference Boyd's April 2009 opposition even though this was a focus of opening statement, testimony, and closing. RP 198, 983, 1870.

Boyd engaged in protected activities on a number of occasions. The first oppositional activity occurred in April 2009. RP 982. Trial exhibit 35 explained:

> In the work place, the behaviors escalated. Others observed her body language toward him, slipping her feet under his chair and spreading her knees apart while she faced him. She would isolate him in a back office, and confided personal details about her life to him. She visited his wife's place of business, and she also continued to press him to return to her home, which he refused to do, until she finally determined that he was not going to ever submit to her overtures. When he finally told her flatly that he was never going to her home, and that he had purchased his own tools that were new and under warranty, she told him that if he ever told anyone about their "private" conversations, she would ruin his career.

(Emphasis added.)

WSH's HR Director agreed oral protests are protected, RP 560-1:

> Q. Now under the policy, you could voice a concern in

several different ways; is that fair?

A. Correct.

Q. I mean, for instance, you could have an oral communication with somebody where you articulate a complaint or demand?

A. Correct.

Q. And that would be a protected act, right?

A. Correct.

Q. That you should not be subjected to retaliation for it under the Hospital's policies, true?

A. True.

Under WSH policy, Maddox was "one of the individuals that would receive reports of alleged discrimination or harassment." RP 295.

Later in January 2010, Boyd told Maddox's supervisor, Southwick, that he did not want Maddox participating in his interview because of an "issue between me and Trish" of "an intimate sexual type nature." RP 1020-21. Following this conversation, Southwick sent an email to Human Resource employee Peggy Nelson on January 26, 2010 where she wrote that, "Chris is uncomfortable having Trisha Maddox at the meeting." Ex. 189. The fact that the supervisor cut him off and failed to elicit details means she was derelict in her duties but it does not change the fact that Boyd's expression of concern was protected.

On December 1, 2010, Boyd met with the WSH's CEO and outlined Maddox's sexual and retaliatory conduct. Ex. 26. On December 3, 2010, Boyd filed a charge of discrimination with the EEOC. Ex. 34. On

December 9, 2010, Boyd's lawyer wrote to WSH's CEO detailing the harassment and retaliation. Ex. 35.

Conclusively establishing Boyd's conduct was reasonable opposition activity, WSH reprimanded Maddox for her conduct. RP 298. Human Resources employee Nelson testified Maddox received a reprimand after "the allegations of sexual harassment" because "[s]he referred to male employees as her penis, and I believe she also referred to female employees as her vagina." RP 1734-35.

2. Adverse Employment Actions Were Taken Against Boyd

The United States Supreme Court issued the seminal decision regarding what constitutes an adverse employment action under Title VII in the case of *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). This Court relied on *Burlington Northern* in *Tyner v. State*, 137 Wn. App. 545, 565, 154 P.3d 920 (2007) (citing *Burlington Northern* for the proposition that "[w]hether a particular reassignment is materially adverse depends upon the circumstances of the particular case . . . .").

Washington courts look to federal interpretations of Title VII as "RCW 49.60 is patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1982). Consequently, decisions interpreting the federal act are persuasive authority for the construction of RCW 49.60." *Oliver v. Pacific Northwest Bell Telephone Co., Inc.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986). Washington

will adopt the analysis of federal cases "where they further the purposes and mandates of state law." *Antonius v. King County*, 153 Wn.2d 256, 266, 103 P.3d 729 (2004). See also, *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004) (considering adverse action and stating "[f]ederal law provides further guidance.").

In *Burlington Northern*, the Court held "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (internal quotations omitted). Addressing the primary criticism raised by WSH in this appeal, that adverse employment actions can only come in certain discrete forms, the *Burlington Northern* Court explained why a general explanation of adverse employment actions is necessary:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." [ ]. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. [ ]. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a

> reasonable employee from complaining about discrimination. [ ]. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."

Burlington Northern, 548 U.S. at 69 (internal citations omitted).

WSH primarily relies on *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004). Br. of Appellant at 23-25. In *Kirby*, the Court cited *Robel v. Roundup Corp.*, 148 Wn.2d 35, 74 n.24, 59 P.3d 611 (2002) and explained that "[a]ccording to our Supreme Court, discrimination requires 'an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.'" *Id.* at 465 (emphasis added). The *Kirby* Court then turned to "[f]ederal law" for "guidance" and explained that "[a]n actionable adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities, [ ] such as reducing an employee's workload and pay[.]" *Id.* (citations omitted). By relying on federal law and explaining retaliation comes in the form of something as amorphous as a "hostile work environment," the holding from *Kirby* is consistent with *Burlington Northern* and recognizes the context of the retaliatory actions is necessary to determine if they are sufficiently adverse. The "such as" language in *Kirby* illustrates adverse actions come in many forms. The critical question is whether the action is sufficiently severe to dissuade a reasonable employee from engaging in opposition activity as a result.

In the case of Boyd, there is no question he sustained *at least* one adverse employment action. In fact, WSH concedes, as it must, that suspending Boyd for two weeks without pay is an adverse employment action. Br. of Appellant at 24 (". . . the suspension without pay can be construed as an adverse employment action"). Beyond the suspension, Boyd presented evidence of additional adverse employment actions that were actionable individually and certainly actionable in the aggregate.

For instance, WSH claims the written reprimand cannot be considered an adverse employment action. However, as the United States Supreme Court explained, "context matters." *Burlington Northern*, 548 U.S. at 69. This is no average written reprimand. It is a multi-page letter, with an attached investigative report, replete with claims about how Boyd in essence threatened to kill his co-workers. The reprimand also changed Boyd's position with respect to the hospital's progressive discipline policy. The jury was within reason to conclude a reprimand *of this nature* would deter a reasonable person from opposition actions.

Again, context matters. In the instant case, either standing alone or in context of all other conduct, preventing Boyd from having patent interactions, filing a complaint on Boyd's nursing license, requesting criminal charges, and denying Boyd overtime were each an adverse employment action. All of this evidence was admitted during the trial and WSH's brief does not assign error to any of the trial court's

decisions admitting evidence. Because Boyd presented admissible evidence of many adverse employment actions, the trial court correctly denied WSH's motion for directed verdict.

3. There Was A Causal Link Between Activity And Adverse Actions

To prevail, "a plaintiff bringing suit under RCW 49.60.210 must prove causation by showing that retaliation was a substantial factor motivating the adverse employment decision." *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991) (holding "this court instead requires plaintiff to prove that retaliation was a substantial factor behind the decision").[30] Washington courts apply traditional concepts of proximate cause in determining when an employer is liable for WLAD damages. *Martini v. Boeing Co.*, 137 Wn.2d 357, 378, 971 P.2d 45, 55 (1999) (WLAD allows damages "so long as the damages were proximately caused by the wrongful act").

Under Washington law, an employer cannot escape responsibility for retaliation proximately caused by one employee, merely because a different employee is the ultimate decisionmaker on the action. In *Allison*, the plaintiff argued her prior supervisor, Ghan, set her up for

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[30] To the extent WSH's brief implies that it can escape liability by demonstrating Boyd would have received discipline and a suspension absent any action by Maddox, this argument is inconsistent with the holding of *Allison* that retaliation need only be a "substantial factor" behind the action. In fact, both the instructions proposed by WSH, CP 2054, and the Court's ultimate unopposed instruction to the jury explain that "Mr. Boyd does not have to prove that his opposition was the only factor or the main factor in Western State Hospital's decision to take an adverse employment action, nor does Mr. Boyd have to prove that he would not have been subjected to such an adverse employment action but for his opposition." CP 2158 (Instruction 7, Appendix A3-1) (emphasis added). See also, WPI 330.05.

termination by giving her negative reviews. 118 Wn.2d at 97. "Allison's theory at trial was that her supervisor, Daphne Ghan 'set up' Allison to be selected for layoff through, for example, giving her poor performance evaluations and giving her an allegedly undeserved reprimand." *Id.* However, a different supervisor, Johnson, later decided to layoff Allison based in part on past reviews from Ghan. *Id.* at 83.

On appeal, the employer asked for dismissal because "there is insufficient evidence to support an inference that discrimination and/or retaliation caused Allison's discharge." *Id.* at 96. Specifically, the employer drew the "court's attention to the fact that Don Johnson, Daphne Ghan's replacement as Home Improvement Program Manager, made his decisions based solely on performance evaluations and production statistics." *Id.* at 98 n.6. The Court rejected this argument, concluding the prior evaluations were "tainted by a retaliatory motive." *Id.* at 98. Ultimately, the *Allison* Court held that "there was sufficient evidence to support an inference that discriminatory or retaliatory motives proximately caused Allison's discharge." *Id.* at 97.

In this case, Boyd argued what is often called the "cat's paw doctrine." This doctrine addresses situations where an employer is liable for the illegal motivation of employees who were a factor in the adverse action, but not the final decision maker. "The term 'cat's paw' derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679[.]" *Staub v. Proctor Hosp.*, 562 U.S. __, 131 S.Ct. 1186, 1190 n. 1 (2011). "In the fable, a monkey induces a cat by flattery to extract

roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." *Id.* In 1990, Judge Richard Posner inserted the phrase into employment law. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) ("If it acted as the conduit of Lehnst's prejudice - his cat's-paw - the innocence of its members would not spare the company from liability"). Following *Shager*, the federal courts overwhelmingly adopted some form of the "cat's paw doctrine." *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484-485 (10th Cir. 2006) (listing case from circuit courts).

In 2011, the United States Supreme Court took the issue under consideration in the context of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). *Staub*, 131 S.Ct. at 1194. While explaining the concept is simply the application of proximate cause, Justice Scalia wrote the majority opinion holding as follows:

> We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.

Staub, 131 S.Ct. at 1194. The *Staub* Court rejected the employer's argument – also advanced by WSH – that an employer is only liable when the formal decision maker was also motivated by discrimination or retaliation. *Id.* at 192. Instead, the Court held that "[s]o long as the agent intends, for discriminatory reasons, that the adverse action

occur, he has the scienter required to be liable under USERRA. And it is axiomatic under tort law that the exercise of judgment by the decision maker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." *Id.*

If an employer conducts an independent investigation, the causal link may be broken. However, when as here the supposedly independent investigator relies on facts provided by the biased supervisor, then the employer has not severed the causal link:

> [I]f the independent investigation relies on facts provided by the biased supervisor—as is necessary in any case of cat's-paw liability—then the employer (either directly or through the ultimate decisionmaker) will have effectively delegated the factfinding portion of the investigation to the biased supervisor.

Staub, 131 S.Ct. at 1193. Accordingly, an independent investigation by the employer does not defeat liability *per se*. *Id.* There is no break in the causal connection where the biased supervisor "actively inserted himself [or herself] in the decision making process," and "both misinformed and selectively informed" the investigators about the facts. *Chattman v. Toho Tenax America, Inc.*, 686 F.3d 339, 353 (6th Cir. 2012); *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) ("[T]he biased subordinate influenced . . . decisionmaking process").[31]

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[31] Although not directly relevant here as Maddox was plainly a supervisor, RP 295, it is worth nothing that the *Staub* court did not take a position on whether the subordinate need be a supervisor. *Staub*, 131 S.Ct. at 1194 ("We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision."). The Ninth Circuit

Following the *Staub* decision, federal courts have uniformly applied this view of proximate cause to all employment discrimination statutes. *Shelley v. Geren*, 666 F.3d 599, 610 (9th 2012) (applying *Staub* to ADEA cause of action); *Chattman*, 686 F.3d at 351 ("While *Staub* dealt with a discrimination claim pursuant to [USERRA], the Court's reasoning applies with equal force to claims brought under Title VII."); *McKenna v. City of Philadelphia*, 649 F.3d 171, 180 (3rd Cir. 2011) (determining in Title VII case "that, under *Staub*, the District Court did not err in denying the City's motion for judgment . . . .").

While the Washington Supreme Court in *Allison* did not articulate its application of the WLAD in terms of the "cat's paw doctrine," the *Allison* Court applied the same proximate cause reasoning as *Staub*. The principles of proximate causation apply as much to Washington law as to a federal employment statute. In fact, WSH does not contend Washington would reject the "cat's paw doctrine," but instead wrongly asserts there was no evidence introduced at trial to support the doctrine's application to Boyd. Br. of Appellant's at 35.[32]

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held that it is irrelevant whether the subordinate is a supervisor or not, so long as there is a causal connection between the retaliatory intent and the final adverse employment action. *Poland*, 494 F.3d at 1182.

[32] WSH writes "to prove cat's paw, Boyd must prove (1) Maddox performed an act motivated with discriminatory/retaliatory animus with the intent to cause an adverse employment action, and (2) the discriminatory/retaliatory act was the proximate cause of the ultimate employment action." Br. of Appellant at 35. The evidence admitted at trial satisfies WSH's claimed standard and support's the jury's verdict.

a. Maddox Acted With Retaliatory Animus With The Intent To Cause Adverse Employment Actions For Boyd

In April 2009, Maddox told Boyd directly that she would retaliate against him. RP 983; Ex. 35. This evidence, admitted without objection, is sufficient evidence alone to establish her intent.

After making this express threat, Maddox decided to start an investigation into Boyd about the December 26, 2009 event. RP 1119. Maddox made this decision even though the employees who were actually present on December 26, 2009 did not believe a complaint was justified. RP 531. Maddox did not observe any of the December 26, 2009 events first hand. RP 432.

Maddox violated WSH requirements by not filing a Security Incident Report, which is required for alleged patient abuse. RP 1422, 1498, 1748. Maddox started investigating on her own and ignored WSH's procedures, steering the investigation toward her retaliatory objectives by not asking any questions about what medications the patient previously received. Instead, Maddox focused her investigation on criticisms of Boyd.

Maddox's retaliatory actions regarding the alleged threats are even more blatant. There, Maddox convinced Cook-Gomez to change her statement and report that Boyd had intended to threaten her. Ex. 25. Maddox overtly suggested to witnesses that Boyd acted inappropriately. Ex. 29. Maddox also knew Ward recanted, but Maddox removed Ward's explanation, retained the allegation, and included it in

her report. Ex. 119. This same type of action occurred with respect to the alleged threat with McCants, which Maddox conceded was appropriate conduct by Boyd. RP 369. Lastly, Maddox attributed threatening statements to Boyd that he did not make and that were taken out of context. Ex. 119, RP 1009-14, 1083.

As a supervisor familiar with WSH policy, Maddox knew what would happen if she leveled accusations of this manner against Boyd, particularly if she could be involved in steering the investigation. As there was ample evidence Maddox acted with retaliatory motive, the trial court properly denied WSH's motion for directed verdict.

b. Rivera's Investigation Was Incomplete, Inaccurate, And Relied Upon Maddox's Tainted Investigation

WSH concedes "where there is evidence that the employer's subsequent investigation failed to separate the biased supervisor's fabrication or animus, resulting in a biased determination and adverse employment action, cat's paw will apply." Br. of Appellants at 37 n.8. Under this standard, the cat's paw doctrine compels a finding of liability. Indeed, Rivera's investigation actually confirmed there was no merit to the threats allegation, utilized Maddox's biased interviews regarding patient abuse, and was otherwise incomplete.

Rivera was asked to review "the investigation done by Patricia Maddox, and the investigation done by Paula Cook-Gomez[.]" RP 592. Regarding the violent threats, Rivera immediately determined the complaint had no merit. RP 592. Nevertheless, WSH still reprimanded

Boyd based solely on Maddox's investigation. RP 592-93.

In his investigation into the December 26, 2009 situation, he declined to interview Boyd. RP 626. Instead, Rivera relied on the interview of Boyd conducted by Maddox and Cook-Gomez. RP 1516. For other witnesses, he simply used the biased statements prepared by Maddox and asked the witness to confirm several months later what Maddox recorded. RP 1517.[33] Maddox's interview of Boyd was inaccurate, in part, because she did not give him an opportunity to explain that the patient had received several medications and did not need another dose in such close proximity of time. RP 1074-75.

Rivera's investigation was not complete for several reasons. First, the primary question was whether Boyd assessed the patient, RP (6/19/13) 112, but Rivera did not even ask the witnesses whether Boyd did so. RP 1504-05. There was an eye-witness who saw Boyd assess the patient. RP 1506, Ex. 85 (Ratcliff statement: "Did you see RN Boyd assess the patient who needed the medication? Yes'"). Second, Rivera never inquired into why the phone records for the few hours at issue on December 26, 2009, showing the exact timing, were

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[33] Rivera testified: "Q. Now you mentioned that you never interviewed Christopher Boyd; is that correct? A. Yes. Q. Christopher Boyd had provided you with additional dates to be interviewed; is that right? A. I'm sorry? Q. He had provided your office with additional dates to be interviewed; is that correct? A. He had provided me, yes. Q. Okay. Would it have been helpful to interview Mr. Boyd? A. Yes. Q. Okay. In lieu of his interview, you relied on the interview by Patricia Maddox and Paula Cook; is that correct? A. I relied on all the information I gathered. Q. But for his interview, you had to rely on that? A. Yes. Q. Okay. And in interviewing other witnesses, you relied on - or you allowed those witnesses to use their interviews or the statements they prepared for Patricia Maddox; is that correct? A. I used them and confirmed it with the employees. Q. Okay. Those were the statements that they had provided to Patricia Maddox though? A. Yes" RP 1516-17.

deleted. RP 1509-10. Third, Rivera's report made a critical math mistake, determining incorrectly that Boyd could have given a second Restoril dose because three hours passed, when in actuality it was only two. RP 791, 794. Rivera's report does not even make mention of the prior doses of Benadryl and Ativan that the patient received. RP 792.

Clearly, this was not a truly independent, thorough investigation.

4. WSH's Reasons Were Undermined And Unbelievable

Assuming *arguendo* WSH did proffer an explanation that satisfied its burden of production, the overwhelming evidence shows WSH's claims are "unworthy of belief or mere pretext for what is in fact a [retaliatory] purpose." *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 89, 272 P.3d 865 (2012). The burden at this stage is one of production, not persuasion. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 98-102, 827 P.2d 1070 (1992). Here, Boyd presented evidence in a number of different areas undermining WSH's explanations.

First, although WSH claims it had legitimate reasons to sanction Boyd, Maddox expressly stated she would take actions in retaliation. RP 983. Maddox's statement alone is sufficient evidence to raise a factual question as to whether any claimed lawful reason for discipline was actually Maddox's pretext – a question the jury answered.

Second, Boyd was singled out for discipline while others were not. For example, WSH employee Manuel Guingab talked about an "AK-47" and joked "around on the phone pretending to be someone else" but

Guingab was not investigated or disciplined. RP 615. Rod Bagsic manipulated a patient chart to omit two drugs he provided but he was not investigated or disciplined. RP (6/19/13) 86-90.

Third, WSH deviated from its progressive discipline policy with Boyd. HR Director Manning testified WSH would only skip to step three, suspension with a loss of pay, in "egregious circumstances" such as "physical force" or "stealing." RP 566, 615-16. However, with Boyd, steps were skipped and WSH went directly to step three. RP 615-16.

Fourth, WSH's Nurse Executive conceded the sanctions Boyd received were more severe than they should have been. The head of nursing testified that the appropriate sanction for delaying assessment of a patient when there was no bad outcome for the patient would be only a written reprimand. RP 739.[34] Here, in contrast to Cook's testimony, Boyd was suspended without pay. Ex. 38.

Fifth, while WSH claimed to have relied on Rivera as an independent investigator, it issued a written reprimand for conduct Rivera determined was unsupported. RP 688-90.[35]

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[34] Cook testified: "Q. Now in the abstract, if you had a situation where there was a delay to get someone assessing a patient, about an hour delay with no bad outcome to the patient, I believe it's your thought that that's something that might result in a written reprimand? A. That's correct. Q. That's your view of what the appropriate type of sanction? A. Yes." RP 739.

[35] HR Director Manning testified: "Q. Well, we're not going to see a report from David Rivera saying I actually did go through the entire investigation and confirmed that it was a legitimate investigation, right? A. There is no report, correct. Q. So the reason that he was brought in was to look into whether it was biased, he didn't answer confirming that it was a neutral investigation, yet Christopher Boyd was still sanctioned for it, correct? A. Under the original investigation, correct. Q. That was done by who? A. Patricia Maddox." (emphasis added).

Sixth, WSH's HR Director testified Maddox should not have had any involvement with the December 26, 2009 investigation, but Maddox collected most of the statements. RP 581-82; Exs. 75-81, 87-90, 91.

Seventh, WSH policy required the issuance of a Security Incident Report regarding any allegation of patient abuse, RP 1498, 1748, to trigger the appropriate type of investigation. In this case, however, Maddox did not file a report, but waited two weeks and then started the investigation on her own. RP 1748, Ex. 75.

The trial court correctly denied WSH's motion for directed verdict.

F. The Instruction On Adverse Action Correctly Stated The Law

WSH argues the trial court failed to "properly instruct the jury" on the definition of an adverse action. Br. of Appellant at 22. Specifically, WSH criticizes Instruction 9, which provided:

> An adverse employment action is defined as an employment action or decision that constitutes an adverse change in the circumstances of employment. An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making complaints of sexual harassment or retaliation. An adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities.

CP 2160. The last sentence came from WSH's proposed instruction 16B, relying on *Kirby*, 124 Wn. App. at 465. CP 2056. RP 1855.[36]

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[36] As the trial court explained, "I would prefer to see the second sentence in Defendant's 16-B be the third sentence in Plaintiff's 14 and in essence I'm combining the two and also using the Burlington language." RP 1855. Having proposed the language limiting the definition of an adverse employment action, WSH cannot now assert that this portion of

At trial, WSH's only objection to Instruction 9 was it followed federal law, *Burlington Northern and Santa Fe Ry. Co. v. White*, 48 U.S. 53, 67-68 (2006), as defining an "adverse employment action." RP 1855. WSH explained "we'll take exception to the fact that that language is given as we believe that's federal law." *Id.* WSH did not argue then, and does not contend now, that the language of the instruction incorrectly stated the federal definition. *Id.*

Therefore, the only question is whether Washington Courts will embrace the federal definition of an adverse employment action.[37] In making its argument, WSH overlooks this Court's decision in *Tyner v. State*, 137 Wn. App. at 565, which cited *Burlington Northern* with approval. On appeal, WSH failed to brief this issue or even cite *Tyner* or *Burlington Northern* anywhere it its brief.[38]

In *Burlington Northern*, 548 U.S. 53, 67-68 (2006), the Court held "a plaintiff must show that a reasonable employee would have found

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the Court's instruction was erroneous. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 74, 877 P.2d 703 (1994) ("Boeing cannot allege error where it proposed an instruction containing the very same error.").

[37] In order to preserve any instructional error for review, CR 51(f) commands that a party must object to the court's instruction with particularity as to the legal error in the instruction. This is to afford the trial court the full opportunity to correct any legal error in the instruction. The failure to clearly object to the instruction results in waiver of any error. *Bitzan v. Parisi*, 88 Wn.2d 116, 125, 558 P.2d 775 (1977) (general objection is "unavailing" to raise any issue if any part of the instruction is valid; instruction becomes the law of the case).

[38] Because WSH has failed to state why it claims Washington would not continue to apply the Title VII definition of an adverse employment action, this Court should not consider the challenge on appeal. *State v. Mason*, 170 Wn. App. 375, 380, 285 P.3d 154 (2012) ("we do not consider his conclusory arguments."); *State ex rel. Helms v. Rasch*, 40 Wn. App. 241, 248, 698 P.2d 559 (1985) ("An assignment of error not supported by argument is deemed abandoned.").

the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (quotations omitted). This was the holding of *Burlington Northern*, the holding approved by this Court in *Tyner*, and the basis for Instruction 9. The trial court did not abuse its discretion nor has WSH established any prejudice.

G. WSH Did Not Preserve Any Objection To The Verdict Form

WSH initially wanted the jury to answer 17 questions on its proposed verdict form. RP 1828-29. At the end of the discussion on June 25, 2013, the trial court indicated that "Defendant's verdict form is too confusing." RP 1832. The trial court asked the parties to consider adding one of WSH's questions to the verdict form proposed by Boyd and to consider "overnight" whether a more simplistic verdict form would work best for both parties. RP 1832-33. The trial court noted "I can't see how this would harm the defense frankly if it was the simpler version . . . ." RP 1832. The next day, a new verdict form was presented in Boyd's Proposed Second Supplemental Instructions, CP 2045, 2050-51. WSH agreed with the new version. RP 1857. The discussion on June 26, 2013, RP 1856-57, was as follows:

> THE COURT: Are we down to the Special Verdict Form?
>
> Mr. Beck: And to be succinct with that, we've proposed one that has a third question adopting the language from the - what was the Defendant's Proposed Verdict Form last question and that's what we'd ask be given. . .

THE COURT: Ms. Bley, verdict form.

Ms. Bley: We'll accept the proposed version contained in Plaintiff's Proposed Second Supplemental Jury Instructions.

RP 1856-57 (Appendix A2-4-5).

CR 51(f) requires that "[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection . . . ." This rule "includes any special verdict forms." *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 10 Wn. App. 412, 427, 40 P.3d 1206 (2002). Compliance with CR 51(f) is necessary for review. *Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 7, 604 P.2d 164 (1979) ("Without a record that shows that exceptions were taken under CR 51(f) on the grounds urged on appeal, we are unable to pass upon the merits . . . .")

H. The Court Did Not Abuse Its Discretion Regarding WSH's Inappropriate 17- Question Verdict Form

WSH argues "[t]he trial court further erred in rejecting Western State's proposed verdict form." Br. of Appellant at 22. In fact, the trial court was correct for a number of reasons. First, the trial court was under no obligation to provide special interrogatories to the jury.[39] Second, adopting WSH's verdict form would have constituted improper comment on the evidence.[40] Third, the form would have constituted

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[39] *Salo v. Nelson*, 22 Wn.2d 525, 529, 156 P.2d 664 (1945)("We have repeatedly held that the matter of submitting, or not submitting, special interrogatories to a jury is a matter entirely within the discretion of the trial court . . . .").

[40] The proposed questions unfairly characterized Boyd's case based on the theories of the defense case. CP. 1980-1984. Article IV, § 16, prohibits the trial court from commenting on the evidence in any form: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *Szupkay v. Cozzetti*, 37

improper argument.[41] Fourth, the questions were cumulative.[42] Fifth, the form was confusing.[43] Sixth, the form inaccurately limited Boyd's opposition activity to complaints of sexual harassment when Boyd also complained about retaliation.[44]

I. The Cat's Paw Instruction Was Language Proposed By WSH

WSH dedicates a section of its brief to criticizing the langue used in the trial court's Instruction 11 claiming that it "allowed the argument that the jury need only find that Maddox acted with animus in order to prevail." Br. of Appellant's at 47. There are two fundamental problems with WSH's argument.

First, the language used in Instruction 11 was proposed by WSH. CP 2063 (Appendix A7). Under the doctrine of "invited error," it is well-established that a party cannot claim language used in an instruction it

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Wn. App. 30, 37, 678 P.2d 358 (1984)("Instructions which recite certain evidence run the risk of being comments on the evidence.").

[41] *Safeco Ins. Co. of America v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 13, 680 P.2d 409 (1984) ("Attorneys should propose instructions which are not argumentative and are not in an unacceptable form.").

[42] *Carle v. McChord Credit Union*, 65 Wn. App. 93, 106, 827 P.2d 1070 (1992)("A trial court is not required to give instructions that are cumulative."). Other instructions explained Boyd must have sustained an "adverse employment action" and the jury could only award proximately caused damages. CP 2158 (Instruction 7 requiring "an adverse employment action"), CP 2163 (Instruction 12 requiring proximate cause for damages), CP 2165. WSH did not object to Instructions 7 or 12.

[43] *Karl B. Tegland*, 14A *Washington Practice* § 31:9 (2013)("The instructions should not be confusing, misleading, or unduly repetitious.")(footnotes omitted); *Juneau v. Watson*, 68 Wn.2d 874, 416 P.2d 75 (1966).

[44] The parties' "joint neutral statement" explained that Boyd "opposed conduct he viewed as sexual harassment and retaliation." CP 932. Similarly, unopposed Instruction 6 explained that "plaintiff claims that the defendant acted wrongfully in retaliating against him for opposing what he reasonably believed to be sexual harassment and retaliation." CP 2157. (emphasis added). WSH's proposed instruction 9B similarly explained "Boyd was opposing what he reasonably believed to be sexual harassment or retaliation." CP 2054 (emphasis added).

proposed was problematic. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006) ("party may not set up error at trial and then complain about the error on appeal"). Because WSH proposed the specific language in Instruction 11, it cannot claim using that langue was in error.

Second, even if this Court were to allow WSH to protest the language in Instruction 11, its analysis is without merit. The entire point of the cat's paw doctrine is to impose liability on an employer when a subordinate acts with the requisite animus to cause an adverse action, even if the ultimate decision maker did not act out of retaliation. WSH's criticism ignores the purpose of the cat's paw doctrine and its proper application.[45]

Here, Instruction 11, as modified by WSH to track WLAD's substantial factor standard, is consistent with *Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (2011). Instruction 11 correctly stated the law, and even if it did not, WSH has not established any prejudice as a result. This Court should reject WSH's challenge to Instruction 11.

J. The Trial Court Did Not Abuse Its Discretion In Issuing A Cat's Paw Instruction As This Was A Key Theory Of Boyd's Case

While WSH cannot challenge the language it proposed, WSH did

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[45] WSH's own brief is internally inconsistent. On one hand, it argues the language "completely eliminated the need for the plaintiff to prove that the decision maker acted with retaliatory animus." Br. of Appellant at 48. Yet, WSH also concedes on a different page that "to prove cat's paw, Boyd must prove (1) Maddox performed an act motivated with discriminatory/retaliatory animus with the intent to cause an adverse employment action, and (2) the discriminatory/retaliatory act was the proximate case of the ultimate employment action." Br. of Appellant at 35.

preserve its right to argue Washington Courts would reject the cat's paw doctrine, and therefore, the trial court should not have given any cat's paw instruction. However, as explained in the previous sections of this brief, Washington adopted the cat's paw concept in *Allison*. While the *Allison* Court did not phrase its reasoning as "the cat's paw doctrine," the trial court correctly determined Washington would expressly adopt the doctrine when given the opportunity to the extent it has not already done so in *Allison*. The trial court acted within its discretion by issuing Instruction 11.

K. Boyd Is Entitled To Attorney's Fees And Expenses On Appeal

Consistent with RAP 18.1, Boyd requests that the Court award fees and expenses for appeal pursuant to RCW 49.60.030.

V. CONCLUSION

Respondent requests that this Court affirm the Pierce County Superior Court's decision to enter judgment against Western State Hospital.

Dated this 20th day of March 2014.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By: _____

James W. Beck, WSBA No. 34208
John C. Guadnola, WSBA No. 8636
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Christine L. Scheall, declare under the penalty of perjury of the laws of the State of Washington that on March 21, 2014, I caused the **Response Brief of Respondent** to be served via email, pursuant to the parties' mutual consent for service by email, and by first-class mail as follows:

Attorneys for Appellant:
Peter J. Helmberger
PeterH@atg.wa.gov
Amanda C. Bley
AmandaB3@atg.wa.gov
1250 Pacific Ave., Suite 105
P.O. Box 2317
Tacoma, WA 98401

Christine L. Scheall

APPENDIX

DOCUMENT TITLE	Respondent's Appendix Nos.
Portions of Report of Proceedings from June 18, 2013	A1
Portions of Report of Proceedings from June 26, 2013	A2
Court's Instruction Number 7	A3
Court's Instruction Number 9	A4
Court's Instruction Number 11	A5
Western State Hospital's Second Supplemental Proposed Jury Instructions	A6
Western State Hospital's Fourth Supplemental Proposed Jury Instructions	A7
Western State Hospital's Proposed Special Verdict Form	A8

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

CHRISTOPHER BOYD, Plaintiff, v. STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES; and WESTERN STATE HOSPITAL, Defendants.	Superior Court No. 12-2-07223-5 Court of Appeals No. 45174-3-II

VERBATIM TRANSCRIPT OF PROCEEDINGS
VOLUME 8 OF 13

June 18, 2013
Pierce County Courthouse
Tacoma, Washington
Before the
Honorable Susan K. Serko

A P P E A R A N C E S

For the Plaintiff:
JAMES BECK
ANDRE PENALVER
GORDON THOMAS HONEYWELL, LLP

For the Defendants:
PETER HELMBERGER
AMANDA BLEY
ASSISTANT ATTORNEYS GENERAL

Lanre Adebayo, CCR
Official Court Reporter
Department 14 Superior Court
(253) 798-2977

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me just ask, did you ever go back out to her house again?

A. No.

Q. Was there ever any experience that you have with Patricia Maddox that was as overt as what you just described at her house?

A. Just at work, you know, the calling me, you know, names; getting close to me in the back office.

Q. Now you mentioned that -- did you become a delegate?

A. I did. You have to -- you have to take around -- the union requires you to take around a large petition and you have to get the signature of all the other RNs in your area as is basically the union's way of verifying whether or not your other RN colleagues support you as being their representative to help them if they have problems.

Q. Now after you got this position in the union, did at some point your interactions with Patricia Maddox change?

A. They did.

Q. And when was that?

A. It was about April 2009.

Q. And why does that time frame stick out in your mind?

A. She came to me and asked me if I was ever going to be able to come back out and get those tools from her late husband. And I told her no, I don't need them and to just leave me alone, you know, and that this is not going to happen, something like that.

Q. Where were you when you had that conversation with Patricia Maddox?

A. Again in the back office.

Q. And when you said that to her, how did she respond to you?

A. First she just kind of gave me this deep stare, you know, upset. And she kind of got a little closer and said something like I know about your past or something, and if you tell anyone about us I'll make sure that you can't work in any of the 50 states. She was pretty hostile at that point.

Q. In your mind when she said that, what did you think she was talking about?

A. I had an alleged complaint on my license earlier on and she had, I guess, looked that up.

Q. And after that conversation with Patricia Maddox, was she kind of affectionate to you like you've described?

A. No.

Q. How did her -- tell the jury how her demeanor changed, if it did.

A. She was very condescending, snappy, all her answers were all snappy and judgmental, always criticizing my work. Just kind of, I felt like, sabotaging my efforts, you know.

Q. We've heard testimony about there is an RN-3 on C-4 and an RN-3 on C-1; is that how it worked?

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

CHRISTOPHER BOYD, Plaintiff, v. STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES; and WESTERN STATE HOSPITAL, Defendants.	Superior Court No. 12-2-07223-5 Court of Appeals No. 45174-3-II

VERBATIM TRANSCRIPT OF PROCEEDINGS
VOLUME 13 OF 13

June 26, 2013
Pierce County Courthouse
Tacoma, Washington
Before the
Honorable Susan K. Serko

A P P E A R A N C E S

For the Plaintiff:
JAMES BECK
ANDRE PENALVER
GORDON THOMAS HONEYWELL, LLP

For the Defendants:
PETER HELMBERGER
AMANDA BLEY
ASSISTANT ATTORNEYS GENERAL

Lanre Adebayo, CCR
Official Court Reporter
Department 14 Superior Court
(253) 798-2977

TABLE OF CONTENTS

EXHIBIT

timing, I would prefer to see the second sentence in Defendant's 16-B be the third sentence in Plaintiff's 14 and take out the current third sentence from Plaintiff's 14. So in essence I'm combining the two and also using the Burlington language. Can that be accomplished by the plaintiff?

MR. BECK: We can make that happen.

THE COURT: So Candy, I am using Plaintiff's 14 except the third sentence is going to be the second sentence from Defendant's 16-B. Does that make sense?

THE JUDICIAL ASSISTANT: Uh-huh.

MS. BLEY: And Your Honor, just so the record is clear. We're going to take exception to the fact that the dissuasion language, which would now be in 14-B the second sentence, "an employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making complaints of sexual harassment or retaliation," we'll take exception to the fact that that language is given as we believe that's federal law. There is no Washington case adopting that as the standard and it actually flies in the face of what the language is in Kirby and in Crownover.

THE COURT: Thank you.

MS. BLEY: It also constitutes a list; and if there is going to be a list of what constitutes an adverse employment action, it should be consistent with the language

that's in Kirby.

THE COURT: It's not a list, I disagree. It's not a list. A list would be a demotion, a change in your lunch time, a lack of pay, a suspension, that would be a list. I disagree that this is a list. I'm going to move on. Thank you for -- I appreciate that the defense objects to this.

Second sentence from Defendant's 16-B will be substituted as the third sentence in Plaintiff's 14. I assume Mr. Penalver made a beeline outside to do that.

MR. BECK: Correct, Your Honor.

THE COURT: And he'll e-mail it to Candy.

MR. BECK: Understood.

THE COURT: Thank you. Next.

MS. BLEY: Special Verdict Form.

MR. BECK: I think it's the Special Verdict Form, Your Honor.

THE COURT: Are we down to the Special Verdict Form?

MR. BECK: And to be succinct with that, we've proposed one that has a third question adopting the language from the -- what was the Defendant's Proposed Verdict Form last question and that's what we'd ask be given. So there'd be three questions; was there retaliation, damages being the second question and the third being a percentage related to the death.

THE COURT: Ms. Bley, verdict form.

MS. BLEY: We'll accept the proposed version contained in Plaintiff's Proposed Second Supplemental Jury Instructions.

THE JUDICIAL ASSISTANT: Great.

THE COURT: We'll add that then, Candy. I think we're just waiting for two instructions from, one from each side that should be coming by e-mail, I hope. Got anything yet?

THE JUDICIAL ASSISTANT: I just got one.

THE COURT: Must have gotten it from the defendant.

THE JUDICIAL ASSISTANT: Yes.

THE COURT: As soon as we have the other one, Candy will put them all together then I will order them and then counsel can stand at the bar and flip through them, ask me to reorder them if you think it makes sense to put them in a different order and then I think we'll make copies and we'll be good to go.

MR. HELMBERGER: Your Honor, while we're waiting on this, I should bring to the Court's and the parties' attention something that happened a moment ago. When Ms. Singleton was in the hallway, down at the other end of the hallway discussing the jury instruction with a legal assistant in our office, Juror Number 5 apparently walked out of the bathroom and walked right by her while she was talking on the phone. That was just reported to me and I thought I

INSTRUCTION NO. 1

It is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be sexual harassment or retaliation.

To establish a claim of unlawful retaliation by Western State Hospital, the Plaintiff has the burden of proving each of the following propositions:

(1) That Mr. Boyd was opposing what he reasonably believed to be sexual harassment or retaliation; and

(2) That a substantial factor in the decision to take an adverse employment action against the Plaintiff was the Plaintiff's opposition to what he reasonably believed to be sexual harassment or retaliation.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the Plaintiff. On the other hand, if any one of these propositions has not been proved, your verdict should be for Western State Hospital.

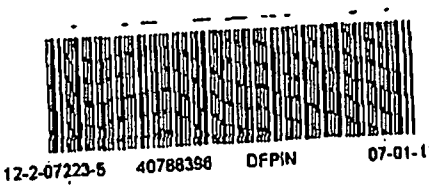
Mr. Boyd does not have to prove that his opposition was the only factor or the main factor in Western State Hospital's decision to take an adverse employment action, nor does Mr. Boyd have to prove that he would not have been subjected to such an adverse employment action but for his opposition.

INSTRUCTION NO. 9

An adverse employment action is defined as an employment action or decision that constitutes an adverse change in the circumstances of employment. An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making complaints of sexual harassment or retaliation. An adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities.

INSTRUCTION NO. //

If a supervisor performs an act motivated by retaliatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is relied on by the employer and is a substantial factor in the ultimate employment action, then the employer is liable for retaliation.



The Honorable Susan K. Serko

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

CHRISTOPHER BOYD, Plaintiff, v. STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES; and WESTERN STATE HOSPITAL, Defendants.	NO. 12-2-07223-5 DEFENDANTS' SECOND SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS (CITED)

Defendants State of Washington, Department of Social and Health Services and Western State Hospital hereby submit their second set of supplemental proposed jury instructions. Defendants expressly reserve the right to amend, supplement and/or withdraw said proposed instructions and/or special verdict form as appropriate based on events of trial. Defendants submit these jury instructions in conformity with the Court's ruling on Defendants' Motion for Summary Judgment. In submitting these jury instructions, Defendants do not concede that the Court's ruling on said motion was correct. Nor do Defendants otherwise waive their right to

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P O Box 2317
Tacoma, WA 98401
(253) 593-5243

pursue any argument that Plaintiff's claims fail as a matter of law. Because summary judgment was denied, Defendants have prepared these instructions despite their position that Plaintiff has not raised a valid, cognizable claim.

RESPECTFULLY SUBMITTED this 25th day of June, 2013.

ROBERT W. FERGUSON
Attorney General

PETER J. HELMBERGER, WSBA NO. 23041
AMANDA C. BLEY, WSBA No. 42450
Assistant Attorneys General
Attorneys for Defendants

INSTRUCTION NO. 9B

It is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be sexual harassment or retaliation.

To establish a claim of unlawful retaliation by Western State Hospital, the Plaintiff has the burden of proving each of the following propositions:

(1) That Mr. Boyd was opposing what he reasonably believed to be sexual harassment or retaliation; and

(2) That a substantial factor in the decision to take an adverse employment action against the Plaintiff was the Plaintiff's opposition to what he reasonably believed to be sexual harassment or retaliation.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the Plaintiff. On the other hand, if any one of these propositions has not been proved, your verdict should be for Western State Hospital.

Mr. Boyd does not have to prove that his opposition was the only factor or the main factor in Western State Hospital's decision to take an adverse employment action, nor does Mr. Boyd have to prove that he would not have been subjected to such an adverse employment action but for his opposition.

WPI 330.05 (modified to be case specific)

INSTRUCTION NO. 14A

Damages for litigation-induced stress are not recoverable as emotional distress damages.

Cicogna v. Cherry Hill Board of Educ., 143 N.J. 391, 671 A.2d 1035 (1996)
School Dist. v. Nilsen, 271 Or. 461, 534 P.2d 1135 (1975)
Buoy v. ERA Helicopters, Inc., 771 P.2d 439 (Alaska 1989)
Torres v. Automobile Club, 41 Cal. App. 4th 468, 43 Cal. Rptr. 2d 147 (1995)
Clark v. United States, 660 F. Supp. 1164 (W.D. Wash. 1987), *aff'd*, 856 Fed.2d 1433(9th Cir. 1988)

INSTRUCTION NO. 16B

An adverse employment action is defined as an employment action or decision that constitutes a tangible change in the employee's employment status. An adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities.

Comments to WPI 330.05 (defining Adverse Employment Action)
Kirby v. City of Tacoma, 124 Wn. App. 454, 465, 98 P.3d 827 (2004) (stating, "An actionable adverse employment action must involve a change in employment conditions that is more than an 'inconvenience or alteration or job responsibilities").
Crownover v. Dept. of Trans., 165 Wn. App. 131, 148, 265 P.3d 971 (2011) (stating, "An adverse employment action means a tangible change in employment status, such as..").

The Honorable Susan K. Serko

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

CHRISTOPHER BOYD, Plaintiff, v. STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES; and WESTERN STATE HOSPITAL, Defendants.	NO. 12-2-07223-5 DEFENDANTS' FOURTH SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS (CITED)

Defendants State of Washington, Department of Social and Health Services and Western State Hospital hereby submit their third set of supplemental proposed jury instructions. Defendants expressly reserve the right to amend, supplement and/or withdraw said proposed instructions and/or special verdict form as appropriate based on events of trial. Defendants submit these jury instructions in conformity with the Court's ruling on Defendants' Motion for Summary Judgment. In submitting these jury instructions, Defendants do not concede that the Court's ruling on said motion was correct. Nor do Defendants otherwise waive their right to pursue any

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P O Box 2317
Tacoma, WA 98401
(253) 593-5243

argument that Plaintiff's claims fail as a matter of law. Because summary judgment was denied, Defendants have prepared these instructions despite their position that Plaintiff has not raised a valid, cognizable claim.

RESPECTFULLY SUBMITTED this 26th day of June, 2013.

ROBERT W. FERGUSON
Attorney General

PETER J. HELMBERGER, WSBA NO. 23041
AMANDA C. BLEY, WSBA No. 42450
Assistant Attorneys General
Attorneys for Defendants

INSTRUCTION NO. 19A

If a supervisor performs an act motivated by retaliatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is relied on by the employer and is a substantial factor in the ultimate employment action, then the employer is liable for retaliation.

Staub v. Proctor Hospital, --- U.S. ---, 131 S. Ct. 1186, 1194 (2011) (stating, "We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.")

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

CHRISTOPHER BOYD, Plaintiff, v. STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES; and WESTERN STATE HOSPITAL, Defendants.	NO. 12-2-07223-5 SPECIAL VERDICT FORM

We, the jury, make the following answers to the questions submitted to the Court:

Question 1: As defined in these instructions, has Mr. Boyd proven his claim of retaliation against Western State Hospital?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 1, do not answer any more questions.*

Sign and return this verdict form.

If you answered "Yes" to Question 1, answer Question 2.

Question 2: As defined in these instructions, was Western State Hospital's decision to investigate allegations of Mr. Boyd's misconduct an adverse employment action?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 2, answer Question 5.*

If you answered "Yes" to Question 2, answer Question 3.

Question 3: As defined in these instructions, was Mr. Boyd's complaint of sexual harassment a substantial factor in Western State Hospital's decision to investigate allegations of Mr. Boyd's misconduct?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 3, answer Question 5.*

If you answered "Yes" to Question 3, answer Question 4.

Question 4: As defined in these instructions, did Western State Hospital's decision to investigate allegations of Mr. Boyd's misconduct proximately cause damages to Mr. Boyd?

ANSWER: Yes_____ No_____

INSTRUCTION: *Answer Question 5.*

Question 5: As defined in these instructions, did Western State Hospital's decision to issue Mr. Boyd a written reprimand constitute an adverse employment action?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 5, answer Question 8.*

If you answered "Yes" to Question 5, answer Question 6.

Question 6: As defined in these instructions, was Mr. Boyd's complaint of sexual harassment a substantial factor in Western State Hospital's decision to issue the written reprimand?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 6, answer Question 8.*

If you answered "Yes" to Question 6, answer Question 7.

Question 7: As defined in these instructions, did Western State Hospital's decision to issue the written reprimand proximately cause damages to Mr. Boyd?

ANSWER: Yes_____ No_____

INSTRUCTION: *Answer Question 8.*

Question 8: As defined in these instructions, did Western State Hospital's decision to transfer Mr. Boyd to Nursing Administration constitute an adverse employment action?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 8, answer Question 11.*

If you answered "Yes" to Question 8, answer Question 9.

Question 9: As defined in these instructions, was Mr. Boyd's complaint of sexual harassment a substantial factor in Western State Hospital's decision to transfer Mr. Boyd to Nursing Administration?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 9, answer Question 11.*

If you answered "Yes" to Question 9, answer Question 10.

Question 10: As defined in these instructions, did Western State Hospital's decision to transfer Mr. Boyd to Nursing Administration proximately cause damages to Mr. Boyd?

ANSWER: Yes_____ No_____

INSTRUCTION: *Answer Question 11.*

Question 11: As defined in these instructions, was Mr. Boyd's complaint of sexual harassment a substantial factor in Western State Hospital's decision to suspend Mr. Boyd for two-weeks?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 11, answer Question 13.*

If you answered "Yes" to Question 11, answer Question 12.

Question 12: As defined in these instructions, did Western State Hospital's decision to suspend Mr. Boyd for two-weeks proximately cause damages to Mr. Boyd?

ANSWER: Yes_____ No_____

INSTRUCTION: *Answer Question 13.*

Question 13: As defined in these instructions, did Western State Hospital's decision to transfer Mr. Boyd to Ward C-8 constitute an adverse employment action?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 13, answer Question 16.*

If you answered "Yes" to Question 13, answer Question 14.

Question 14: As defined in these instructions, were Mr. Boyd's complaints of sexual harassment and/or retaliation a substantial factor in Western State Hospital's decision to place Mr. Boyd in Ward C-8?

ANSWER: Yes_____ No_____

INSTRUCTION: *If you answered "No" to Question 14, answer Question 16.*

If you answered "Yes" to Question 14, answer Question 15.

Question 15: As defined in these instructions, did Western State Hospital's decision to place Mr. Boyd in Ward C-8 proximately cause damages to Mr. Boyd?

ANSWER: Yes_____ No_____

INSTRUCTION: *Answer Question 16.*

Question 16: What do you find to be the amount of plaintiff's damages?

ANSWER: $ _____

INSTRUCTION: *If your answer for Question 16 is zero, sign and return this form.*

If your answer for Question 16 is greater than zero, answer Question 17.

Question 17: If any, what percentage of the amount of plaintiff's damages is attributable to finding the body of Paul Montefusco?

ANSWER: _____%

INSTRUCTION: *Sign and return this form.*

Date: _____

_____

Presiding Juror